Tan Mooi @ Tan So Yin & Ors v Tengku Mohd Saad & Ors (administrators for the estate of Tunku Mansur bin Tunku Yaacob, deceased) and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(I)–29 OF 2008(W), (I)–30 OF 2008(W), 02(I)–33 OF 2008(W) AND 02(I)–34 OF 2008(W)
ARIFIN ZAKARIA CJ (MALAYA), RAUS SHARIF AND ABDULL HAMID EMBONG FCJJ
7 JANUARY 2011

Evidence — Statement — Statement made in ordinary course of business — Whether statement made by deceased during his lifetime to his personal assistant ('PW2') admissible in evidence — PW2 testified that deceased had told him defendant had not paid purchase price for transfer of shares to him and that until payment was made deceased retained beneficial ownership of shares — PW2 managed deceased's business and personal affairs during his absence and had close relationship based on confidence, consultation and trust — Whether deceased's statement to PW2 about defendant and shares were made 'in the ordinary course of business' and were admissible under s 32(1)(b) of the Evidence Act 1950

During his lifetime, a businessman ('the deceased') transferred 1.2m of his ordinary shares in a company to one Tay Choo Foo ('Tay') for a total purchase price of RM1.2m on condition that until the full purchase price was paid, he would retain the beneficial ownership in the shares. Some years after the share transfer was done, the company carried out a bonus issue of additional shares which resulted in Tay's shareholding increasing to 4,580,600 shares. Tay transferred four million of the shares to his wife ('Tan Mooi') who, in turn, gave one million shares to each of her two daughters. Following the deceased's death, the administrators of the deceased's estate sued Tay, Tan Mooi and their two daughters ('the defendants') for recovery of the unpaid purchase price for the shares; alternatively, for return of the shares on the ground of total failure of consideration for their transfer. In allowing the administrators' claim, the High Court relied substantially on the evidence of the donee ('PW2') of the deceased's power of attorney, who testified that the deceased had told him that Tay had not paid him the RM1.2m for the shares in question. The trial judge held that since PW2 managed the business and personal affairs of the deceased whenever the deceased was away, all statements the deceased had made to PW2 with regard to his business and personal affairs were statements made in the 'ordinary course of business' and were therefore admissible in evidence under

A s 32(1)(b) of the Evidence Act 1950. The trial judge found that PW2 was a credible, reliable and disinterested witness who had no pecuniary interest in the outcome of the suit. The Court of Appeal ('COA') affirmed the trial court's decision and dismissed the defendants' appeals after reserving judgment. In the interim period between conclusion of the hearing of the appeals and delivery of B judgment, the defendants had sought leave to adduce further evidence of a testimony PW2 had given in another suit ('the Alor Setar suit') which allegedly contradicted what he had told the trial court in the instant appeal. The defendants contended that the 'new evidence' could materially affect the outcome of the instant appeals. The COA dismissed the application holding C that a comparison of PW2's testimony in the two suits did not reveal any material discrepancies that would have caused the trial judge in the instant case to alter his verdict. The appellants were granted leave to appeal to the Federal Court against the COA's decision as a whole.

D **Held**, dismissing the appeals herein:

(1) The exception in s 32(1)(b) of the Evidence Act 1950 extended to both written and verbal statements. It was the duty of the Court to give effect to the express words of the statute. To agree with the proposition E advanced by the defendants (ie, that s 32(1) only referred to written, and not verbal, statements) would be to nullify the express words of s 32(1)(b). The fact that the statement in question was oral in nature only went to the weight to be attached to it rather than to its admissibility (see paras 28 & 33).

F (2) PW2's evidence was, in the circumstances of the case, forceful and overwhelming as to the existence of a very close personal and business relationship with the deceased right up to the time of his death. It was a relationship based on confidence, consultation and trust. The deceased confided in him and discussed all his business investments with him. G Therefore, the requirement that the statement should be one made in the usual practice, habit or routine of the deceased in business, constituting 'the ordinary course of business', was amply met in this case. Thus, the statement in issue in the present case fell squarely within the scope of s 32(1)(b) of the Evidence Act 1950 (see para 43).

H (3) After comparing the evidence of PW2 in the present case with that in the Alor Setar suit, this court agreed with the COA that the discrepancies were merely in relation to the date he met the deceased in Perth and the state of the deceased's health at the material time. PW2's evidence in the present case and in the Alor Setar suit was unwavering as to the fact I that he met and spoke to the deceased before he passed away at the Perth

Hospital and that the deceased spoke to him concerning the shares. There was no plausible reason to interfere with the COA's finding that the 'fresh evidence' would not have had any bearing on the evidence of PW2 in the present case (see paras 50–51).

[Bahasa Malaysia summary

Semasa hidupnya, ahli perniagaan ('si mati') memindahkan 1.2 juta saham dalam syarikat kepada seorang bernama Tay Choo Foo ('Tay') bagi harga belian sejumlah RM1.2 juta atas syarat bahawa sehingga harga belian penuh dibayar, dia akan mengekalkan pemilikan benefisial dalam syer. Beberapa tahun selepas saham dipindahkan, syarikat menjalankan pengeluaran bonus syer tambahan yang mengakibatkan peningkatan pemegangan saham Tay kepada 4,580,600 saham. Tay memindahkan empat juta saham kepada isterinya ('Tan Mooi') yang, sebaliknya, memberi satu juta saham kepada setiap dua anak perempuannya. Berikutan kematian si mati, pentadbir-pentadbir estet si mati menyaman Tay, Tan Mooi dan kedua-dua anak perempuan mereka ('defendan-defendan') untuk mendapatkan semula harga belian yang tidak dibayar bagi saham-saham tersebut; secara alternatif, untuk pengembalian saham-saham tersebut atas alasan kegagalan balasan sepenuhnya bagi pemindahan tersebut. Dalam membenarkan tuntutan pentadbir, Mahkamah Tinggi bergantung ke atas keterangan penerima derma ('PW2') surat kuasa wakil si mati, yang memberi keterangan bahawa si mati telah memberitahunya bahawa Tay tidak membayar kepadanya RM1.2 juta bagi saham-saham yang dipersoalkan. Hakim bicara yang bijaksana memutuskan bahawa memandangkan PW2 menguruskan perniagaan dan hal elwal peribadi si mati bila si mati menguruskan kerja lain, kesemua penyataan si mati telah buat kepada PW2 berkaitan kepada perniagaan dan hal ehwal peribadinya adalah penyataan yang dibuat 'ordinary course of business' dan oleh itu boleh diterima sebagai keterangan di bawah s 32(1)(b) Akta Keterangan 1950. Hakim perbicaraan mendapati bahawa PW2 adalah boleh dipercayai, boleh diharap dan saksi yang tidak berminat yang tidak mempunyai kepentingan kewangan dalam keputusan tindakan tersebut. Mahkamah Rayuan ('MR') mengesahkan keputusan mahkamah perbicaraan dan menolak rayuan-rayuan defendan selepas menangguhkan membuat keputusan. Dalam tempoh interim di antara kesimpulan pendengaran rayuan-rayuan dan penghakiman, defendan-defendan telah memohon izin untuk mengemukakan keterangan PW2 selanjutnya yang diberikan di dalam tindakan yang lain ('tindakan Alor Setar') yang mana bercanggah dengan apa yang dia beritahu kepada mahkamah perbicaraan dalam rayuan ini. Defendan-defendan berhujah bahawa 'new evidence' boleh secara material menjejaskan keputusan rayuan-rayuan ini. MR menolak permohonan dengan memutuskan bahawa perbandingan keterangan PW2 dalam kedua-dua tindakan tidak menunjukkan apa-apa percanggahan material yang akan menyebabkan hakim

perbicaraan dalam rayuan ini untuk mengubah keputusannya. Perayu-perayu diberikan izin untuk merayu kepada Mahkamah Persekutuan terhadap keputusan MR secara keseluruhannya.

Diputuskan, menolak rayuan-rayuan di sini:

(1) Pengecualian dalam s 32(1)(b) Akta Keterangan 1950 dilanjutkan kepada kedua-dua penyataan bertulis dan lisan. Ia adalah tugas mahkamah untuk memberi kesan kepada perkataan-perkataan nyata statut. Untuk bersetuju dengan cadangan yang dikemukakan oleh defendan-defendan (iaitu, bahawa s 32(1) hanya merujuk kepada penyataan bertulis dan bukan penyataan lisan) akan membatalkan perkataan-perkataan jelas s 32(1)(b). Fakta bahawa penyataan yang dipersoalkan adalah bersifat lisan hanya kepada keberatannya daripada kepada kebolehterimaannya (lihat perenggan 28 & 33).

(2) Keterangan PW2 adalah, dalam keadaan kes, tegas dan sangat besar terhadap kewujudan hubungan peribadi dan perniagaan yang sangat rapat dengan si mati sehingga kepada kematiannya. Ia adalah hubungan yang berdasarkan ke atas keyakinan, perundingan dan amanah. Si mati mengadu dan berbincang kesemua pelaburan perniagaannya dengan PW2. Oleh itu, kehendak bahawa penyataan patut satu yang dibuat dalam amalan biasa, tabiat atau rutin si mati dalam perniagaan, membentuk 'the ordinary course of business', dipenuhi dengan secukupnya dalam kes ini. Oleh itu, penyataan yang dipersoalkan dalam kes ini terangkum dalam skop s 32(1)(b) Akta Keterangan 1950 (lihat perenggan 43).

(3) Selepas membandingkan keterangan PW2 dalam kes ini dengan tindakan di Alor Setar, mahkamah ini bersetuju dengan MR bahawa percanggahan hanya berkaitan kepada tarikh dia berjumpa dengan si mati di Perth dan keadaan kesihatan si mati pada masa material. Keterangan PW2 dalam kes ini dan tindakan di Alor Setar adalah tidak goyah terhadap fakta yang dia berjumpa dan bercakap dengan si mati sebelum dia meninggal dunia di Hospital Perth dan bahawa si mati bercakap dengannya mengenai saham-saham tersebut. Tidak terdapat alasan munasabah untuk campur tangan dengan dapatan MR bahawa 'fresh evidence' akan mempunyai apa-apa kesan ke atas keterangan PW2 dalam kes ini (lihat perenggan 50–51).]

Notes

For cases on statement in general, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3046–3290.

Cases referred to

Abdulla @ Maung Doola & Anor v Ma E Kin [1911] 11 IC 854 (refd)
Devi Singh v Mt Phulma AIR 1961 HP 10, HC (refd)
Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124; [1986] 2 CLJ 285, SC (refd)
Morley v National Insurance Co [1967] VR 566 (refd)
Myers v Director of Public Prosecution [1964] 2 All ER 881, HL (refd)
Ningawa v Bharmappa & Ors [1899] 23 ILR Bombay 63 (refd)
PP v Leong Heo Cheong [1990] 2 CLJ 818; [1990] 2 CLJ Rep 738, HC (refd)
Ramamurthi v Subba Rao AIR 1937 Mad 19 (refd)
Sheonandan Singh & Ors v Jeonandan Dusadh & Anor [1909] 1 IC 376 (refd)
Soney Lall Jha v Darbdeo Narain Singh AIR 1935 Patna 167 (refd)
Stapylton v John Clough & Robert Clough 118 ER 1016 (refd)
Teper v Reginam [1952] 2 All ER 447, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(2), (3)
Evidence Act 1872 [IND] s 32(2)
Evidence Act 1950 ss 32, 32(1), (1)(b), 60

Appeal from: Civil Appeal Nos W–02–1022 of 2005 and W–02–1023 of 2005 (Court of Appeal, Putrajaya)

DP Naban (Andrew Chiew with him) (Lee Hishammuddin Allen & Gledhill) in Civil Appeal Nos 02(I)-29 of 2008(W) and 02(I)-30 of 2008(W) for the appellants.
Tommy Thomas (Joseph Yeo with him) (Joseph Yeo) in Civil Appeal Nos 02(I)-33 of 2008(W) and 02(I)-34 of 2008(W) for the appellants.
Cyrus Das (Jagjit Singh, CW Teo and TB Tan with him) (Khaw & Partners) in Civil Appeal Nos 02(I)-29 of 2008(W), 02(I)-30 of 2008(W), 02(I)-33 of 2008(W) and 02(I)-34 of 2008(W) for the respondents.

Arifin Zakaria CJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal dated 17 June 2008 dismissing the appellants' appeal. Leave to appeal was granted by this court on 2 September 2008 on the following questions:

Question 1:

> Whether matters communicated by a deceased to a donee of a power of attorney who generally handles the deceased's personal business affairs constitute verbal

A statements made in the ordinary course of business and hence, admissible as an exception under s 32(1)(b) of the Evidence Act 1950.

Question 2:

Whether an appellant is entitled to adduce further evidence which were subsequent to the decision appealed from as of right and without leave of court under s 69(2) and s 69(3) of the Courts of Judicature Act 1964 and r 7(2) of the Rules of the Court of Appeal 1994.

Question 3:

Whether there is a conflict between s 69(3) of the Courts of Judicature Act 1964 and r 7(3A), Rules of the Court of Appeal 1994 and if so, whether the latter is *ultra vires*.

For convenience, the parties will be referred to as plaintiffs and defendants as in the trial court.

D

THE FACTS

[2] The facts relevant to this appeal are briefly as follows:

E These four appeals, namely Civil Appeal Nos 02(I)-29 of 2008(W), 02(I)-30 of 2008(W), 02(I)-33 of 2008(W) and 2(I)-34 of 2008(W) ('the first, second, third and fourth appeal respectively') arose out of the same suit, ie, High Court Kuala Lumpur Civil Suit No D3–22–4404 of 1998 and were heard together on the request of all parties.

F

[3] The plaintiffs are the children and the administrators of the estate of the late Tunku Mansur bin Tunku Yaacob ('the deceased').

Tay Choo Foo @ Tay Chiew Foo, the appellant in the third and fourth appeals ('the first defendant'), and Tan Mooi @ Tan So Yin, the appellant in first and second appeals ('the third defendant'), are husband and wife respectively. Tay Hui Ching and Tay Hui Woon, the second and third appellants in the first and second appeals ('the fourth and fifth defendants') are their daughters.

[4] In the trial court, Harrisons Holding (M) Bhd ('HHMB') was named as the second defendant. HHMB is, however, neither a party to the appeals before us nor in the Court of Appeal. HHMB is a locally incorporated public company and currently listed on the Bursa Saham Kuala Lumpur. HHMB was formerly known as Jantoco Trading Sdn Bhd, a private limited company. It changed its name to Harrisons Holdings (M) Sdn Bhd and later to HHMB when it became a public limited company. HHBM is presently the 100% registered proprietor of the following companies:

(a) Harrisons & Crosfiled (M) Sdn Bhd (now known as Harrisons Trading

(Peninsular) Sdn Bhd); and

(b) Harrisons & Crosfiled (Sabah) Sdn Bhd (now known as Harrisons Trading (Sabah) Sdn Bhd).

(Collectively referred to as 'the H&C subsidiaries'.)

[5] At all material times, the deceased and the first defendant were friends and have had some business dealings from time to time. The deceased had worked for the H&C subsidiaries for about 20 years and was the chairman of both companies since 1978. Sometime in 1990, the deceased proposed to effect a management buy-out out of the H&C subsidiaries from their then shareholder, Harrisons & Crosfiled Plc. As the deceased was short of fund to carry out the management buy-out, the first defendant proposed the participation of a group of Indonesian businessmen known as the Bumi Raya Utama Group ('the BRUG') in funding the proposed management buy-out of the H&C subsidiaries. An agreement/understanding was reached between the deceased and the BRUG that the proposed management buy-out of the H&C subsidiaries be effected on, inter alia, the following terms:

(a) the BRUG will 'contribute' up to a maximum amount of RM50m for the acquisition of the H&C subsidiaries and be entitled to 60% of the share ownership of the H&C subsidiaries at par value, via the second defendant;

(b) the deceased and his group will be entitled to 40% of the share ownership of the H&C subsidiaries at par value, through their ownership in the second defendant;

(c) the deceased will stay on as the chairman of the H&C subsidiaries for as long as he like; and

(d) in recognition of the deceased's long service in the H&C subsidiaries and the assurance given by the deceased that he will be able to obtain some discount to the acquisition price of the H&C subsidiaries from Harrisons & Crossfiled Plc, the BRUG agreed to pay a sum of RM5m to the deceased.

[6] As the final acquisition of the H&C subsidiaries was agreed at RM52.5m, the deceased agreed to bear the excess amount of RM2.5m in the acquisition price of the H&C subsidiaries. In part implementation of the agreement/understanding between the BRUG and the deceased as stated above, an amount of 2.6m ordinary shares in the second defendant was paid for and issued to the deceased.

[7] It is the pleaded case of the plaintiffs that the deceased had agreed to sell 10% of his shareholding in the second defendant amounting to 1.2 million

ordinary shares ('said shares') to the first defendant at its nominal value of RM1.2m ('purchase price') on the terms, inter alia, that until the full purchase price is paid by the first defendant, the beneficial ownership of the said shares shall remain with, and vest in, the deceased. The said shares were registered in the name of the first defendant sometime in March 1992. However, the purchase price for the said shares was not paid by the first defendant.

[8] The deceased passed away on 27 October 1993. After the death of the deceased, the first defendant was in communication with the plaintiffs from time to time. On several occasions, the first defendant admitted that he has not paid the purchase price to the deceased for the said shares, but suggested that the said shares were given to him by the deceased for free.

[9] The plaintiffs averred that the first defendant is obliged to pay the purchase price for the said shares and he failed or refused to make such payment to the deceased or the plaintiffs. Alternatively, the plaintiffs averred that the transfer of the said shares to the first defendant was made without any consideration at all and it is unlawful and unconscionable for the first defendant to retain ownership of the said shares.

[10] On 10 November 1998, the plaintiffs made a demand against the first defendant for the payment thereof, failing which proceedings will be commenced to recover the said shares from the first defendant.

[11] While the suit was pending hearing, HHMB carried out a bonus issue as a consequence of which additional HHMB shares were issued to the first defendant by virtue of him being the registered holder of the said shares. The bonus issue resulted in the first defendant's shareholding to increase from 1.2 million shares to a total of 4,580,600 shares.

[12] On or about 28 April 2000, the first defendant transferred 4 million shares to the third defendant. On or about 11 December 2000, the third defendant transferred 1 million shares to the fourth defendant. On or about 26 December 2000, the third defendant further transferred another 1 million shares to the fifth defendant.

[13] As a result of this development, the plaintiffs made an application to join the third, fourth and fifth defendants as defendants to the action. The application was allowed and the pleadings were accordingly amended.

[14] The plaintiffs' case against the first defendant is that the first defendant was to pay a sum of RM1.2m to the deceased for the said 1.2 million shares and that until the full RM1.2m is paid, the beneficial ownership of the said 1.2 million shares shall remain with, and vest in the deceased.

THE HIGH COURT

[15] At the end of the trial, the learned High Court judge found that the plaintiffs have, on the balance of probabilities, proven their claim against the defendants and hence allowed the plaintiffs' claim with costs against first, third, fourth and fifth defendants and made the orders as prayed, but as regard the second defendant, he made no order as to costs.

[16] In coming to his finding, the learned judge relied substantially on the evidence of Gabriel Patrick O'Holohan ('PW2'), the holder of the deceased's power of attorney who testified that he was told by the deceased that the first defendant has yet to pay a sum of RM1.2m to the deceased as consideration for the said 1.2 million shares transferred by the deceased to the first defendant and that it was agreed between the deceased and the first defendant that until the first defendant pays the sum of RM1.2m, the beneficial ownership of the said 1.2 million shares shall remain with, and vest in the deceased.

[17] Further, the learned High Court judge was also of the view that the words 'in the ordinary course of business' appearing in s 32(1)(b) of the Evidence Act 1950 ('the EA') should be given 'a broad and liberal connotation' and for support referred to *Devi Singh v Mt Phulma* AIR 1961 HP 10. He also referred to *Ramamurthi v Subba Rao* AIR 1937 Mad 19, where the court expressed the view that the words 'in the course of business' appearing in s 32(2) of the Indian Evidence Act 1872 ('the IEA') means the way the business (which may be of a purely private or even trivial nature) is conducted and have no connection with the course of business suggesting a series of acts of business. The learned judge held:

> Based on the above cited case authorities, it is my view since PW2 was at all material times the holder of a power of attorney from the late Tunku Mansur and was required to manage the business and personal affairs of the late Tunku Mansur anytime when he was away, all statements made by the late Tunku Mansur to PW2 with regard or pertaining to his business and personal affairs would necessarily be statements made in the 'ordinary course of business' and therefore admissible in evidence. I also find that PW2 is a credible and reliable witness. PW2 is not an interested witness and he did not have any pecuniary interest in the outcome of the present suit.

[18] In relation to the issue as to whether the first defendant has to pay the sum of RM1.2m to the deceased as consideration for the said shares, the learned judge held:

> It is incontrovertible that the late Tunku Mansur and the first defendant executed

A the transfer form on 27 January 1992 ('exh P5') and the consideration for the transfer was stated as RM1.2m. Stamp duty for the said transfer calculated based on a consideration of RM1.2m was paid on 28 January 1992 to the collector of stamp duty. The transfer form ('exh P5') was subsequently submitted by the first defendant to the second defendant on 7 February 1992 to have the transfer effected. The first B defendant claimed that the consideration of RM 1.2m was filled in the transfer form ('exh P5') to comply with the requirement of PW7, the second defendant's company secretary. However the contemporaneous documents and the objectives facts do not support this claim of the first defendant as the transfer form ('exh P5') has been duly completed and executed before the first defendant submitted the same to the second defendant. Instead the contemporaneous documents and the C objective facts clearly lend support to the plaintiffs' claim that the first defendant was to pay RM1.2m for the said 1.2 million shares.

[19] As to whether the first defendant has paid the sum of RM1.2m for the said shares to the deceased, the learned judge held:

D It is my finding that it is undisputed fact that the first defendant never paid any money to the late Tunku Mansur for the said 1.2 million shares. In his defence, the first defendant pleaded that the shares to be given or acquired by the late Tunku Mansur personally in the MBO were to be divided equally between the first defendant and the late Tunku Mansur as the first defendant has agreed to pay for any E acquisition price in excess of RM55m. In support of this contention exh D59 was introduced in evidence by the first defendant during the cross-examination of PW1. However, in his witness statement ('DWS1'), the first defendant took a different position and claimed that the late Tunku Mansur and him would share 'whatever money' (as opposed to shares) that they get from BRUG and therefore the issue of F him having to pay for the said 1.2 million shares never arise.

[20] In relation to the issue as to whether the beneficial ownership of the said shares shall remain with, and vest with the deceased until the first defendant pays the said sum of RM1.2m, the learned judge held:

G It is clear from the evidence of PW2 that it was agreed between the late Tunku Mansur and the first defendant that the first defendant was to hold the said 1.2 million shares for the late Tunku Mansur until the first defendant pays for them.

COURT OF APPEAL

H

[21] At the end of the hearing of the appeals, the Court of Appeal had reserved its judgment. Prior to the delivery of the judgment by the Court of Appeal, the first, third, fourth and fifth defendants had filed an application for leave to adduce further evidence, namely the evidence of PW2, in another I Civil Suit No MT 1–22–06–94 in the Alor Setar High Court between Foyin Development Sdn Bhd as plaintiff and Tunku Yaacob Holdings Sdn Bhd and

Cayman Development (SP) Sdn Bhd as defendants ('the Alor Setar suit'). It was alleged that, in that suit, PW2 gave evidence which is contradictory to what he had testified in the instant case under appeal and that this new evidence would have had a material effect on these appeals as the learned judge had relied substantially on the evidence of PW2 in coming to his decision.

[22] The Court of Appeal in dismissing the application, addressed it in this manner:

> We have perused the evidence of PW2 as highlighted in the notes of proceedings of the suit in the Alor Setar High Court and compared it with his evidence in the instant appeals and found there are no discrepancies that would have any bearing on the decision of the learned judge. No questions with regards to the said shares were put to PW2 in the Alor Setar High Court which is the subject-matter of these instant appeals. We are of the view that the defendants failed to exercise reasonable diligence to challenge PW2's evidence and credibility before the learned judge when he gave evidence in the instant appeals and cannot now claim that he has given a different story in the Alor Setar High Court when no such thing took place.

[23] Further down the Court of Appeal added:

> It is our unanimous view that the excerpts from the evidence of PW2 in the Alor Setar High Court as highlighted by the defendants would not have had any bearing on the decision in the instant appeals. The learned judge was satisfied that PW2 was a reliable witness. Besides relying upon the evidence of PW2, he had also stated in his judgment that he arrived at his decision based on other contemporaneous evidence and assessment of the credibility of the other witnesses.

[24] In relation to the first, third, fourth and fifth defendants' main appeal, the Court of Appeal dismissed their appeals with costs and affirmed the decision of the High Court. The Court of Appeal held:

> In the instant appeals, we are of the view that there will be unjust enrichment if the defendants were allowed to keep the said shares. The learned judge was right in imputing or imposing a constructive trust whereby the first defendant held the said shares on trust for the deceased's estate. Having regard to his conduct, and in not being able to prove his claim that the said shares were given gratuitously to him by the deceased and his conduct in transferring the 4 million shares to the third defendant notwithstanding his undertaking given to the court, it would be inequitable to allow him to deny the deceased's estate of the said shares.

THIS COURT

[25] This court had on 2 September 2008 granted leave to the defendants to appeal against the decision of the Court of Appeal on the three questions of law set out earlier.

The first question

[26] The first question is on the admissibility of PW2's evidence that the deceased in his lifetime had told him that he had sold the said shares at par value for RM1.2m to the first defendant; that the shares were transferred to the first defendant to enable him to raise fund to pay for the shares; and that the first defendant had not paid for the shares.

[27] The said evidence of PW2 was admitted under s 32(1)(b) of the EA. For ease of reference, the relevant part of the provisions is reproduced below:

> 32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant.
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (a) ...
>
> (b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or singed by him of the receipt of money, good, securities or property of any kind; or of a document used in commerce, written or singed by him, or of the date of a letter or other document usually dated, written or singed by him;

[28] The word 'statements' in subs (1) of s 32 is qualified by the words 'written or verbal'. Therefore, it would appear that 'statements' in the said subsection would include either written or verbal statements. However, Mr Tommy Thomas who appeared for the defendant in the appeal number 02(i)–33 of 2008(W) and 02(i)–34 of 2008(W) submitted that 'statements' in s 32(1) refers to written statements and not verbal statements. In other word, it does not include verbal statements. He contended that in interpreting s 32, one should go back to s 60 of the EA as s 32(1) is a mere exception to s 60. He further stated that s 32(1) must be given a strict interpretation. His contention is that both the Court of Appeal and the High Court erred in law in giving the said section a broad interpretation.

[29] He referred us to two local authorities namely: *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124; [1986] 2 CLJ 285 and *Public Prosecutor v Leong Heo Cheong* [1990] 2 CLJ 818; [1990] 2 CLJ Rep 738. In both cases he said, the court did not consider as a matter of principle whether verbal statement comes within the ambit of s 32(1)(b) of the EA. On that premise, he said that this issue is an open issue and invite this court to interpret the same. In support of his submission,

he also referred us to the Indian and English authorities. He referred us to the Indian case of *Devi Singh v Mt Phulma* AIR 1961 HP 10 and the English case of *Stapylton v John Clough & Robert Clough* 118 ER 1016. He concluded, saying that in *Devi Singh v Mt Phulma* AIR 1961 HP 10 the court made no detailed consideration of the difference between written and verbal statement under their s 32(2) of the IEA and, therefore, the judgment is not persuasive on the issue. With regard to the English position, he said the reception of oral statement is severely limited, although admissible.

[30] He also cautioned us against a liberal interpretation of s 32 of the EA as it is merely an exception to the general rule against hearsay evidence. He reminded us of the observations of Lord Normand in *Teper v Reginam* [1952] 2 All ER 447 and Lord Reid in *Myers v Director of Public Prosecution* [1964] 2 All ER 881, of the dangers of relying on hearsay evidence, more so in the case of oral evidence.

[31] In response, Dato' Cyrus Das, learned counsel for the plaintiffs contended that the submission by Mr Tommy Thomas is contrary to the express words of the statute. It would in effect be nullifying the word 'verbal' appearing in the opening part of s 32(1) of the EA. He contended that the words '... in particular ...', further strengthen the argument that s 32(1)(b) is not confined to written statements alone. He referred us to *Sarkar's Law of Evidence* 15th Ed 1999 at p 684, in regard to s 32(2) of the IEA which reads:

> The statement may be verbal or written. Oral statements, answering of course all other requisite conditions are equally receivable; the evidence however commonly appears in a written form (see *Sussex Peerage Case*, 11 C1&F 113; *Stapylton v Clough*, 2 E & B 933 and *Edie v Kingsford*, 14 CB 759, 763; Best, 11th Ed s 502). The effect of the statement as to weight may be different in the two cases but both are equally receivable or relevant. The words, 'and in particular' in this clause seem to point to the superior force of written over verbal statement (Nort p 177).

[32] Further, he said, quite contrary to the submission of the defendants, s 32 of the EA should be given a liberal treatment rather than a restrictive treatment. This is because the said section seeks to provide the statutory exceptions to the common law rule against hearsay evidence. He said such was the approach adopted by the Australian Courts in *Morley v National Insurance Co* [1967] VR 566. In that case, McInerney J at p 567 noted:

> The Act is one designed to liberalize rules of evidence and should not be restrictively construed ... it would be contrary to the policy of the legislation to give a restricted meaning ...

[33] Having considered the arguments of both parties, we are inclined to the view expressed by the plaintiffs as it is in line with the express words of the

relevant statutory provisions. It is the duty of the court to give effect to the express words of the statute. To agree with the proposition as put forward by the defendants would be to nullify the express words of the s 32(1)(b) of the EA. Further, the approach adopted by us here seems to be in accord with that adopted in India and Australia. We fully agree with the sentiment expressed by the Indian and Australian courts that the statutory provisions in issue here are to provide exceptions to the common law rule against the reception of hearsay evidence. We agree with the plaintiffs that the facts that the statement in question was oral in nature would go to the question of weight to be attached to it rather than to the issue of admissibility. Hence, it is our unanimous view that the exception in s 32(1)(b) of the EA extends to both written and verbal statements.

[34] Having said that, the next issue is whether the oral statements made by the deceased to PW2 on 26 October 1993 were made in the 'ordinary course of business' as contemplated by s 32(1)(b) of the EA.

[35] Learned counsel for the defendants urged the court not to take a broad and liberal approach in interpreting the phrase 'ordinary course of business'. The plaintiffs on the other hand submitted that s 32(1)(b) of the EA should not be restricted by any qualification on capacity as in England and it should be given a broad interpretation. Having considered the authorities and submissions by parties, we are of the view that the English authorities is of not much assistance as it is not based on a similar provision as our s 32 of the EA. For that reason, we are of the view that the Indian position is more applicable because it is based on a similar provision, which is s 32(2) of the IEA. Therefore, it is highly relevant for us to consider the decisions in India relating to the said section.

[36] The expression 'ordinary course of business' was considered in a number of Indian authorities. In *Ningawa v Bharmappa & Ors* [1899] 23 ILR Bombay 63, Fulton J, expressed the view that:

> ... in using the phrase 'in the ordinary course of business' the Legislature probably intended to admit in evidence statements similar to those admitted in England as coming under the same description. The subject is dealt with in Chapter XII of *Mr Pitt Taylor's Treaties on the Law of Evidence*, and the cases which he has collected show that this exception to the general rule against hearsay extends only to statements made during the course, not of any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The phrase was apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce.

[37] Similarly, in the case of *Sheonandan Singh & Ors v Jeonandan Dusadh &*

Anor [1909] 1 IC 376, Holmwood J said:

> The phrase does not apply to any particular transaction of an exceptional kind such as the execution of a deed of mortgage but to business or professional employment in which the declarant was ordinarily or habitually engaged.

It may thus be said that the phrase is clearly not intended to include a statement in a deed of sale, which may be an isolated transaction in the course of a person's lifetime (see *Soney Lall Jha v Darbdeo Narain Singh* AIR 1935 Patna 167).

[38] In *Devi Singh v Mt Phulma* AIR 1961 HP 10, the court took a more liberal approach. It observed as follows:

> The words 'in the ordinary course of business' in s 32(2) should be given a broad and liberal connotation. The disruption of the status of a joint family is a matter with which the ladies of the family not only keep themselves in touch, but usually, if not invariably, have also a say thereon ... Thus, an important event in the history of a family communicated by either the husband to his wife or by an elder to a younger even in the ordinary course of conversation at a time when there is no controversy about it may well be held to be a statement made in the ordinary course of business.

[39] Similarly, in *Abdulla @ Maung Doola & Anor v Ma E Kin* [1911] 11 IC 854, where a husband wrote a letter to his wife in which he told her that a certain person had asked for a loan, and the learned judge while declaring the letter inadmissible, expressed the opinion that if he had succeeded in proving that he was in the habit of consulting his wife before he made such loans, such a letter would have been written in the ordinary course of business. In that case, it was held that the statement was merely a piece of information and as no evidence ever adduced to show that he had ever acquainted his wife with such matter before. On that score, it could not be said that the information was given in the ordinary course of business. Therefore, the phrase 'in the ordinary course of business' in our s 32(1)(b) of the EA as in s 32(2) of the IEA is used to indicate the current routine of business which was usually followed by the person whose declaration is sought to be introduced.

[40] Thus, from the authorities, it would appear that the declaration need not be in any formal business setting; it could be a communication between the husband and wife as in the case *Devi Singh v Mt Phulma* AIR 1961 HP 10. What is crucial is whether it is the usual practice of the declarant to inform or discuss his or her affairs or business with the witness. Therefore, it is important to determine the relationship between the deceased and PW2.

[41] The evidence reveals that the statement was not a single statement made as a death-bed statement by the deceased to PW2 shortly before his death. It is not disputed that PW2 had both personal and business relationship with the deceased for over 33 years. The evidence shows that the PW2 was the deceased

A closest companion and confidante who was called to his bedside at the point of his death. The deceased had then confided to PW2 that he had leukemia and told PW2 to keep it secret. The deceased regularly consulted PW2 on both his personal and business affairs. PW2 also held a power of attorney from the deceased since 1977 giving him authority to handle his business affairs during his absence. This power of attorney continued until his death. PW2 was also appointed as a director of both his investment and family company.

[42] In his witness statement, PW2 amongst others stated:

C (a) Tunku Mansur always discussed with me all his personal and business affairs and got me to assist him with his personal and family businesses.

(b) I assisted Tunku Mansur in running his personal holding company, Rofia Sdn Bhd, and his family company, Tunku Yaacob Holdings Sdn Bhd. Tunku Mansur appointed me director and general manager of Rofia Sdn Bhd and Tunku Yaacob Holdings Sdn Bhd.

(c) Tunku Mansur however would always discuss all his business plans with me and sought my views before proceeding with the same.

E (d) He was extremely honest and for some reason took a liking to me and over the 33 years we knew each other he confided in me his personal and business secrets.

[43] We, therefore, agree with the submission made by the plaintiffs that PW2's evidence was, in the circumstances, forceful and overwhelming as to the existence of a very close personal and business relationship with the deceased right up to the time of his death. It was a relationship based on confidence, consultation and trust. The deceased confided in him and had discussed all his business investments with him. Therefore, we agree that the requirement that the statement should be one made in the usual practice, habit or routine of the deceased in business, constituting 'the ordinary course of business' is amply met in this case. Thus, the statement in issue in the present case in our view falls squarely within the scope of s 32(1)(b) of the EA.

[44] On the above premise, we agree with the learned trial judge that the statement in issue in the present case was one made in the usual practice, habit or routine of the deceased, thus coming within the phrase 'in the ordinary course of business'.

[45] For the above reasons, our answer to the first question is in the positive.

The second and third questions

[46] At the Court of Appeal, the first, third, fourth and fifth defendants filed further application for leave to adduce further evidence. This relates to the evidence of PW2 given in the Alor Setar suit.

[47] It was alleged that the evidence of PW2 given in the Alor Setar suit is contradictory to his evidence in the present case and this new evidence would have a material effect on the outcome of the present case. Before the Court of Appeal, the question of whether leave was required or not in order to adduce this fresh evidence was not in issue as the learned counsel who appeared for the defendants agreed that the applications before the Court of Appeal were in fact leave applications.

[48] After perusing the evidence of PW2 in the Alor Setar suit and comparing it with his evidence in the present case, the Court of Appeal came to the conclusion that there is no discrepancy that would have any bearing on the decision of the learned trial judge in this present case. The Court of Appeal further noted that no question with regard to the relevant shares was in fact put to PW2 in the Alor Setar suit. And the defendants in the present case have themselves to blame for failing to challenge PW2's evidence and his credibility during the trial before the trial court in the present case.

[49] The Court of Appeal further found that the discrepancy was more in relation to the state of health of the deceased when he was in the intensive care unit rather than the content of the conversation between PW2 and the deceased.

[50] After comparing the evidence of PW2 in the present case and that in the Alor Setar suit, we agree with the Court of Appeal that, the discrepancies, are merely in relation to the date he met the deceased in Perth; that is, whether it was on 26 October 1993 or 27 October 1993 and the state of deceased's health at the material time. PW2's evidence in the present case and in the Alor Setar suit was unwavering as to the fact that he met and spoke to the deceased before the deceased passed away at Perth Hospital and the deceased spoke to him concerning the shares.

[51] From the judgment of the Court of Appeal, it is clear that the Court of Appeal had thoroughly considered the evidence of PW2 in the Alor Setar suit and after having done so, came to the conclusion that this fresh evidence would not in any event have any bearing on the evidence of PW2 in the present case. This was a finding made by the Court of Appeal. We find no plausible reason to interfere with the said finding.

[52] In the light of above, we do not think that it is necessary for us to answer the second and third questions.

A CONCLUSION

[53] In the result, the appeals are dismissed with costs. We will now invite counsel to address us on the issue of costs.

B *Appeal dismissed with costs.*

Reported by Ashok Kumar

C

D

E

F

G

H

I